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Supreme Court of the United States

October Term 1961

In the Matter
of

DUTCHER CONSTRUCTION CORPORATION,
Bankrupt.

**RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF
CERTIORARI TO REVIEW AN ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIR-
CUIT AFFIRMING AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
NEW YORK**

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IN THE
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In the Matter
of
DUTCHER CONSTRUCTION CORPORATION,
Bankrupt.

**BRIEF ON BEHALF OF RESPONDENT RELIANCE
INSURANCE COMPANY IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

Statement

The petitioner seeks a writ of certiorari on the ground that the United States Court of Appeals for the Second Circuit has misconstrued the decision of this Court in *United States v. Munsey Trust Co.*, 332 U. S. 234, 67 S. Ct. 1599, decided in May 1947.

The Question Involved

The matter in issue is whether a surety who has paid all of its bankrupt contractor-principal's unpaid labor and material bills on a federal job, is entitled to the contract balance ahead of the bankrupt contractor's Trustee in Bankruptcy.

The interests of the United States are in no way involved.

The funds in question represent the fruit of labor and materials furnished and supplied to the Corps of Engineers, relating to a St. Lawrence Seaway job, prior to the bankruptcy of the contractor. There are no unpaid job creditors on the contract out of which the funds in question arose, as the surety has paid all of them. The funds were paid to the Trustee in Bankruptcy under a tacit agreement between the trustee and the surety in the interest of an orderly determination of the question here involved.

POINT I

This Court has clearly indicated the scope and limits of its determination in *United States v. Munsey Trust Co.*, 332 U. S. 234, 67 S. Ct. 1599 (1947), and accordingly the granting of a writ of certiorari is not necessary.

By a long line of decisions starting with *Prairie State National Bank v. U. S.*, 164 U. S. 227 in 1896 this Court has recognized the distinctive and equitable rights of a surety, who has completed its defaulted principal's contract to receive the remaining unpaid contract moneys.

Later in 1908 this Court in *Henningsen v. U. S. F. & G. Co.*, 208 U. S. 404, 28 S. Ct. 389, likewise recognized the surety's same distinctive and equitable rights to the unpaid contract moneys where the surety, pursuant to its obligation or bond, paid the contractor's unpaid bills for the labor and material which went into the improvement, and which labor and material "produced" the contract moneys in question.

In 1921 the Sixth Circuit, in *Belknap Hardware Co. v. Ohio River Co.*, 271 Fed. 144, commented at some length on the surety's right of subrogation recognized by this Court in the *Henningsen* case (*supra*).

In none of those cases were the rights of the United States involved. In the intervening years there was little or no variation in the decisions of the Courts as to the surety's paramount rights under either a performance bond, such as was involved in the *Prairie State Bank* case (*supra*), or under a labor and materials or payment bond, such as was involved in the *Henningsen* case (*supra*). And this was true whether the surety's contestant was an assignee bank or the contractor's Trustee in Bankruptcy.

In *United States vs. Munsey Trust Co.*, 332 U. S. 234, 67 S. Ct. 1599, this Court in 1947 had a situation where the United States was more than a stakeholder of the contract funds. The contractor owed the Government money on one unbonded contract and, at the same time, the Government owed the same contractor money on other contracts which the surety bonded. The contractor's surety on the bonded contracts sought the total contract balance on the bonded contracts on which it had paid labor and material bills. The Government asserted its right of set-off.

This Court permitted the Government to enjoy its set-off for its claims on the unbonded contract out of the contract moneys on the bonded jobs, but very clearly limited the scope of its holding to set-off situations.

In unmistakable language this Court, at page 240, wrote:

"From *Prairie State Nat. Bank of Chicago v. United States*, 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412, to *American Surety Co. v. Sampsell*, 327 U. S. 269, 66 S. Ct. 571, 90 L. Ed. 663, we have recognized the

peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available moneys ahead of others whose claims come from the advance of money. But in all those cases, the owner was a mere stakeholder and had no rights of its own to assert." (Emphasis ours.)

The petitioner has assumed or conceded that, had the respondent paid losses under the performance bond, it would be entitled to the fund here in question.

In this connection, it is significant that while the surety involved in the *Munsey Trust* case had paid bills under its payment bond, this Court, in the quotation set forth above, cited both the *Prairie State National Bank* case, decided in 1896, which involved a *performance bond*, and also the *American Surety Co. v. Sampsell* case, decided in 1946, a year before the *Munsey Trust* case, which involved a *payment bond*. And, of course, included within the time span of those two decisions, was the *Henningsen* case (*supra*) which also involved a payment bond.

In other words, it would appear quite clear that this Court recognized the peculiar and distinctive equities of a surety under *both a performance and a payment bond*.

In 1955, the Court of Claims, in *National Surety Corp. v. U. S.*, 133 Fed. Supp. 381, had before it a contest between a surety on a payment bond on a Government contract, and an assignee bank of contract moneys in the hands of the Government, which was a mere stakeholder.

In awarding the fund to the surety, the Court of Claims wrote at page 383:

"We reiterate our former opinion that the equity of the surety company is superior to the rights of the bank acquired under an assignment, *whether the surety's rights are derived from the discharge of its liability on a performance bond or on a payment bond.*

In *Prairie State Nat. Bank, supra*, the surety had discharged its liability on a performance bond, and in *Henningsen, supra*, its liability on a payment bond." (Emphasis ours.)

In November of 1955, this Court denied a petition for a writ of certiorari in this case *sub. nom. First National Bank in Houston v. U. S.*, 350 U. S. 902, 76 S. Ct. 181.

Thus, we respectfully submit, this Court, since its decision in the *Munsey Trust* case, has not been inclined to disturb the decision of at least one Court which, 1) refused to draw any distinction between a surety who has sustained losses under a *performance bond* on the one hand, and a surety who has sustained losses under a *payment bond*, and 2) which sustained the paramount right of the surety to the contract balances.

Accordingly, we respectfully submit that the present case does not call for any further review by this Court.

POINT II

The petition for a writ of certiorari should be denied.

We respectfully submit that the decision of the Second Circuit Court of Appeals in the instant case is in conformity with the decision of this Court in the *Munsey* case (*supra*), and that the petition for a writ of certiorari to review the decision of said Second Circuit Court of Appeals should be denied.

Respectfully submitted,

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